

ALAMO RANCH CO., INC.

IBLA 95-184

Decided March 7, 1996

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, finding that a maintenance fee waiver certificate for the Midas No. 10 mining claim was untimely filed and that the claim was therefore conclusively deemed forfeited. NMMC 26857.

Affirmed.

1. Administrative Authority: Generally—Board of Land Appeals—Delegation of Authority—Regulations: Generally—Regulations: Validity

The Board of Land Appeals has been delegated the appellate decisional authority of the Secretary. In the context of deciding an appeal, the Board has the authority to consider whether application of a regulation to an appellant adversely affected thereby is consistent with the underlying statute, *i.e.*, whether the regulation is duly promulgated as applied to appellant.

2. Mining Claims: Rental or Claim Maintenance Fees: Generally—Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Section 10101(d) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C.A. § 281(d) (West 1995), granted the Secretary broad discretionary authority to provide for the waiver of required mining claim maintenance fees for claimants holding 10 or fewer claims. Pursuant to this authority, the Department adopted 43 CFR 3833.1-7(d) (1994), which required that any small miner seeking a waiver of the maintenance fees for the assessment year commencing on Sept. 1, 1994, file a certification of entitlement on or before Aug. 31, 1994. Where a claimant has failed to timely file such a certification for certain mining claims and has also failed to timely submit the required maintenance fees for the claims, those mining claims are properly deemed conclusively to be forfeited.

APPEARANCES: John Keck, President, Alamo Ranch Company, Inc., Thermal, California, for appellant; Paul B. Smyth, Esq., and Karen Hawbecker, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Alamo Ranch Company, Inc. (Alamo), has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated November 22, 1994, finding that a maintenance fee certification for the Midas No. 10 mining claim (NMMC 26857), which had been received on October 3, 1994, was untimely under 43 CFR 3833.1-7(d), 59 FR 44861-62 (Aug. 30, 1994). The cited regulation provides, *inter alia*, that "[i]n order to hold mining claims or sites for the assessment year beginning at 12 o'clock on September 1, 1994, each small miner shall file a waiver certification on or before August 31, 1994." The decision of the New Mexico State Office further provided that, pursuant to the provisions of 43 CFR 3833.4(a)(2), 59 FR 44862 (Aug. 30, 1994), the failure to file the maintenance fee waiver or to submit the required fee on or before August 31, 1994, was "deemed conclusively to constitute a forfeiture of the mining claim."

Alamo accompanied its notice of appeal with a request that the Board stay the effectiveness of the decision below during the pendency of the appeal as provided by 43 CFR 4.21(a). By order dated March 1, 1995, we granted this request, noting that there were

substantial questions as to the legal basis for the regulatory conclusion that (1) certification by a mining claimant of entitlement to a waiver of the maintenance fees was required to be filed as of the same date that payment of the maintenance fee was due and (2) whether, assuming that there has been a late filing of the waiver request, there is a legislative basis for 'conclusively' deeming the claim to be forfeited.

(Order of Mar. 1, 1995, at 1).

The order then proceeded to briefly limn the predicates for our concerns:

[W]e note that, while section 10101(a) of the Act of August 10, 1993, 107 Stat. 405, [30 U.S.C.A. § 28f(a) (West 1995),] clearly provides that payment of the claim maintenance fee must be made "on or before August 31 of each year, for years 1994 through 1998," section 10101(d)(1) of that Act, which establishes procedures for obtaining a waiver of the maintenance fee provides:

The claim maintenance fee required under this section may be waived for a claimant who certifies in

writing to the Secretary that[,] on the date the payment was due, the claimant and all related parties—

(A) held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands, and

(B) have performed assessment work required under the Mining Law of 1872 (30 U.S.C. 28-28e) to maintain the mining claims held by the claimant and such related parties for the assessment year ending on noon of September 1 of the calendar year in which the payment of the claim maintenance fee was due.

107 Stat. 405-406 (August 10, 1993). We would point out that, not only is this section totally silent as to any deadline for filing the certification but, of equal importance, the certification provided for requires the claimant to attest that "on the date payment was due" the conditions were such (only 10 claims were held and required assessment work had been performed) that a waiver of the maintenance fee could be granted. This use of the past verb tense would, at a minimum, seem to clearly countenance (if not affirmatively compel) the submission of the certification after the date of the relevant maintenance fee deadline provided in subsection (a).

Even assuming that the provisions of 43 CFR 3833.1-7(d) could be read as a Departmental fleshing out of the statutory language, insofar as the waiver filings are concerned, there would still be substantial questions whether, under precedents established by the Board relating to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1988), the failure to timely submit the waiver document should be considered a curable defect. See, e.g., Harvey Clifton, 60 IBLA 29 (1981); Perry L. Johnson, 57 IBLA 20 (1981); Harry J. Pike, 57 IBLA 15 (1981); Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981). [Emphasis in original.]

Id. at 1-2.

Recognizing the likely importance of any such ruling, the Board requested that the Office of the Solicitor enter an appearance on behalf of BLM and brief the issues delineated above. Pursuant to this request, the Solicitor's Office submitted a response to our order on May 25, 1995.

The response filed on behalf of BLM proceeded along two separate tracks. Thus, on the one hand, the response asserted that the regulation was consistent with the statutory framework established in 30 U.S.C.A. §§ 28f through 28k (West 1995). On the other hand, the response argued that, not only did the Board lack the authority to determine that a

regulation was contrary to its statutory basis, the Board did not even possess the authority to "review the validity or legality of departmental regulations" (Response at 5 (emphasis supplied)). Inasmuch as this last argument, if accepted, would preclude any analysis of the correctness of BLM's claim that the regulation does, indeed, comport with the statute, we will take it up first.

In brief, BLM's argument proceeds as follows. Starting with an initial assertion that the Interior Board of Land Appeals (IBLA) derives its authority from the general authority delegated to the Director of the Office of Hearings and Appeals (OHA) (Response at 4), BLM points out that the Director is authorized to exercise all of the supervisory authority of the Secretary over hearings and appeals "in accordance with existing policies, regulations, and procedures of the Department" (Response at 4-5, citing 211 DM 13.1). BLM then notes that "[t]he IBLA is likewise 'authorized to exercise, pursuant to regulations published in the Federal Register, the authority of the Secretary in deciding appeals'" (Response at 5, citing 211 DM 13.5 (emphasis added)). After noting that, under 43 CFR 4.410(a)(3), a party to a case does not have a right to appeal to the Board where the decision has been approved by the Secretary, BLM concludes that "as a simple matter of delegated authority, while the Board may review decisions of the BLM to determine whether those decisions are in accordance with Secretarial regulations, orders, or policies, it may not review the validity or legality of departmental regulations" (Response at 5).

In an effort to buttress its foregoing assertion, BLM then embarks upon an analysis of this Board's decision in Blue Star, Inc., 41 IBLA 333 (1979), in which the Board had held that it lacked the authority to review a decision of the Assistant Secretary, and concludes that a similar result should occur with respect to rulemaking "because the delegated authority of the Secretary is fully exercised in rulemaking" (Response at 5). BLM finds further support for its position in the numerous decisions of the Board which have declared that the Board lacks jurisdiction to make determinations regarding the validity of the Department's regulations (Response at 6). While BLM recognizes, in a footnote, that an expressed premise of these decisions has been that the regulation must have been duly promulgated, BLM discounts this by simply asserting that "a review of a regulation to determine whether it has been duly promulgated appears to be a matter reserved for judicial review as well and is equally outside of the Board's delegated authority" (Response at 6 n.6). ^{1/}

^{1/} BLM also asserts that "[t]he only circumstance under which the Board can properly deviate from the general rule regarding its jurisdiction to make determinations regarding regulations is if the regulation has previously been found lacking by a judicial court decision." Id. As is noted subsequently in the text of this opinion, however, BLM provides no explanation as to how the mere existence of a Federal court decision could vest the Board with independent jurisdiction to decide the validity of a regulation if no such jurisdiction would otherwise exist.

Later in its submission, BLM adverts to the decisions referenced by the Board in its order of March 1, 1995. While it recognizes that the effect of these decisions was to invalidate the application of regulations which treated certain regulatory filing deficiencies relating to mining claims and mill and tunnel sites as giving rise to a conclusive presumption of abandonment, "it appears that this line of decisions is not well founded given the existing limitations on the Board's authority to act in accordance with departmental regulations" (Response at 11). Arguing that the proper forum in which to challenge regulations is Federal court, BLM continued, "If a regulation is ever expressly invalidated through proper judicial proceedings, then, of course, the Board is thereafter free to adjudicate BLM's decisions in accordance with such judicial precedent" (Response at 11-12).

Lastly, BLM assails the analysis contained in the concurring opinion in George E. Krier, 92 IBLA 101, 103-06 (1986). After generally reiterating its argument that the Board lacks jurisdiction to even consider the validity of regulations (whether or not duly promulgated), the response then turns to the concurring opinion's reliance on the decision in Continental Oil Co., 70 I.D. 473 (1963), in which Secretary Udall approved a decision of the BLM Director finding a Departmental regulation to be invalid and holding that it would no longer be followed. While recognizing that, on matters properly before it, the Board's jurisdiction may be deemed to be "coextensive with that of the Secretary" (Exxon Company, U.S.A., 15 IBLA 345, 353 (1974)), BLM argues that "as discussed above, the Board's authority is not coextensive with the Secretary's with regard to rulemaking" (Response at 13). BLM concludes:

Consequently, the Board is an administrative body for reviewing decisions made by subordinates to the Secretary in order to determine whether or not the decisions are made in accordance with existing regulations. No authority exists for the Board to review the regulations or make determinations regarding their validity. In this case, the Board should not engage in a review of the maintenance fee regulations. It should determine if the BLM decision appealed from was decided in accordance with those regulations, as it was.

(Response at 14).

[1] At the outset, we wish to make it clear that, notwithstanding the assertion that the Board is attempting "to expand" its authority to review the regulations at issue herein, it is, in reality, BLM which is seeking to alter the basis upon which Departmental adjudications have heretofore proceeded. Thus, while BLM now assails what it refers to as the Feldslite line of cases, the fact of the matter is that when those decisions were issued BLM did not seek Board reconsideration of any of these decisions. Nor did it seek review of them under 43 CFR 4.5 by the Director or the Secretary, even though BLM now asserts that all of these decisions were ultra vires. Nor did BLM object when, as the response notes, the Board "decided numerous subsequent cases on the principles defined in these four cases"

(Response at 10 n.8). And, as we shall show, these are not the only Board decisions which have determined that regulations were not duly promulgated and, therefore, could not be followed in a specific appeal.

Thus, in Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981), the Board held that 43 CFR 3523.3 (1976), which provided for the automatic termination of a coal lease upon the failure to timely pay the rental on or before the anniversary date of the lease, had been improperly promulgated, was lacking in any statutory support, and had been consistently ignored by the Department in actual practice. Terming it "a derelict upon the sea of the law," the Board expressly held that "this regulation can be accorded no validity whatsoever." Id. at 72, 88 I.D. at 30. Similarly, in William F. Branscome, 81 IBLA 235 (1984), the Board held that, notwithstanding the regulatory language of 43 CFR 3108.2-1(a), where an untimely annual rental payment for an oil and gas lease was postmarked prior to the anniversary date of the lease but received within 20 days of the due date the lease terminated by operation of law pursuant to the clear meaning of 30 U.S.C. § 188(b) (1994). The Board held that, while the regulatory language could be construed so that such actions constituted reasonable diligence on the part of the lessee permitting reinstatement of the lease, the regulation could not prevent the initial termination of the lease since that was provided by the statute.

What all of the foregoing cases have in common, besides the fact that in each a regulation was deemed to be inconsistent with express statutory language and was accordingly held to have been improperly promulgated, is that in none of them did BLM seek reconsideration of the decision by the Board on the ground that the Board lacked the authority to refuse to enforce regulations which it had found to be in conflict with statutory enactments. Far from it, in each case, the regulations were ultimately amended to reflect the Board's determination.

Nor has BLM merely acquiesced in the Board's exercise of this authority. BLM now argues that the Board lacks authority to even consider whether or not a regulation has been duly promulgated. Yet, in numerous past cases, the Solicitor's Office, on behalf of BLM, has made detailed arguments designed to show that regulations under attack in a specific appeal did, indeed, comport with the statutory basis upon which they were premised. While it is true that in all but the handful of cases set forth above the Board has agreed with BLM's position, it is difficult to reconcile the great efforts expended both by the Solicitor's Office and this Board in analyzing the statutory basis of regulations in those past cases with the present assertion that any consideration of a regulation's fidelity to its statutory mandate is beyond the jurisdictional purview of the Board. 2/

2/ Indeed, in Tenneco Oil Co., 36 IBLA 1 (1978), the Office of the Solicitor, on behalf of the U.S. Geological Survey, argued that an appeal from

In any event, it is easy to discern the underlying rationale both for the briefing by BLM and the detailed analysis by this Board of issues related to a regulation's fidelity to and consistency with an underlying statute. Final Departmental decisions are subject to reversal on judicial review under the Administrative Procedure Act (APA) when the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law. 5 U.S.C. § 706(2)(A) (1994). One of the key questions examined under this standard is whether a regulation as applied in the decision under review is consistent with the statutory authority under which that regulation was presumably promulgated. There are many cases in which courts have relied upon the Board's analysis of this issue to uphold the application of Departmental regulations. See, e.g., KVK Partnership v. Hodel, 759 F.2d 814, 816 (10th Cir. 1985), aff'g KVK Partnership, 69 IBLA 199 (1982) (upholding a decision rejecting an oil and gas lease offer for failure to comply with the regulations regarding evidence of qualifications on the ground that "the regulations at issue are reasonably related to legitimate agency activity within the scope of its authority"); Ramoco, Inc. v. Andrus, 649 F.2d 814, 816 (10th Cir. 1981), cert. denied, 454 U.S. 1032 (1981), aff'g Ram Petroleum, Inc., 37 IBLA 184 (1978) (citing numerous IBLA decisions analyzing the regulatory requirements for reinstatement of a terminated oil and gas lease, the Court held that the interpretation of the terms "reasonable diligence" and "justifiable," as applied by the Board, were not inconsistent with their statutory basis); Coastal States Energy Co. v. Watt, 629 F. Supp. (D. Utah 1985), aff'd in part and rev'd in part on other grounds, 816 F.2d 502 (10th Cir.), aff'g Coastal States Energy Co., 70 IBLA 386 (1983) (affirming coal lease readjustment regulations as applied to appellant's lease as reasonable and finding that the regulations were consistent with statutory authority); cf. Conway v. Watt, 717 F.2d 512 (10th Cir. 1983) (reversing a decision applying a regulation requiring the dating of an oil and gas lease application to automatically disqualify an undated offer as not supported by congressional intent).

IBLA's authority to decide appeals for the Secretary is not derivative of authority granted to the Director, OHA. Rather, it exists as an independent grant from the Secretary directly to IBLA. See, e.g., James C. Mackey, 96 IBLA 356, 361, 94 I.D. 132, 135 (1987). This can be seen both from the Departmental Manual as well as the Department's regulations. With respect to IBLA, 211 DM 13.5 provides, in relevant part:

a Chief Administrative Judge of Land Appeals, under the direction of

fn. 2 (continued)

the promulgation of Notice to Lessees (NTL) 5 should be dismissed since it constituted the final product of rule-making which could not be directly appealed to the Board. Rather, the Solicitor asserted, if and when NTL-5 were ever applied to Tenneco, it could, at that time, challenge the substance of the rule. The Board agreed and dismissed that appeal since it was not yet ripe for review. Id. at 2-3.

to regulations published in the Federal Register, the authority of the Secretary in deciding appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources and the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf, * * * [and] matters relating to land selection under the Alaska Native Claims Settlement Act [and] the review functions of the Secretary under the Surface Mining Control and Reclamation Act of 1977. [Emphasis supplied.]

To similar effect are the Department's regulations. See 43 CFR 4.1. Thus the Board's jurisdictional grant of authority is, under its own terms, a direct grant from the Secretary to the Board.

Moreover, an examination of the actual language of IBLA's delegation as it appears in the Departmental Manual effectively refutes BLM's argument that the authority to determine whether or not a regulation had been duly promulgated was expressly excluded from the delegation of authority to the Board. As is obvious from a reading of the delegation, the phrase on which BLM places so much weight, "pursuant to regulations published in the Federal Register," does not, as BLM contends, modify the authority granted to the Board; it modifies the exercise of that authority. In other words, this language neither limits nor constrains the decisional authority otherwise granted by the Secretary. It merely requires that IBLA exercise this authority under published regulations, as it has, in fact, always done.^{3/} There is, in short, no support in the Board's delegation of authority for BLM's assertion that the Board lacks the authority to determine whether a regulation has been duly promulgated pursuant to lawful authority.

BLM suggests that the analysis of the Board set forth in Blue Star, Inc., supra, is also at odds with the Board's assertion that it may review a regulation to determine whether or not it has been duly promulgated. In point of fact, however, no such conflict exists. In Marathon Oil Co., 108 IBLA 177 (1989), we explored the theoretical predicates of the Blue Star case. Therein we noted that the authority of the Board to review any matter was essentially the result of two separate regulations. The first of these was 43 CFR 4.1(b)(3) which replicated the broad subject matter grant of decisional authority provided by 211 DM 13.5. But, we cautioned, "[T]he mere fact that a decision is within the general public lands and minerals subject matter jurisdiction of the Board does not establish that such a decision is subject to review by the Board." Id. at 178. Rather, we noted that "[o]nce a decision can be said to be within the subject matter jurisdiction of IBLA, it is still necessary to establish that the prospective appellant has a right to appeal the decision to the Board," and,

^{3/} And, as will be shown below in the text of this decision, it was the regulatory limitations appearing at 43 CFR 4.410(a)(3) which provided the animating rationale of the Blue Star decision.

we continued, "Resolution of this question is, itself, determined by reference to either 43 CFR 4.410 or 30 CFR 290.7." Id. (footnote omitted).

In Marathon, as in Blue Star, a prospective appellant sought to appeal from a decision which had been approved by an Assistant Secretary. Noting that 43 CFR 4.410(a)(3) expressly excepts from the right of appeal any decision where that "decision has been approved by the Secretary," the Board in Marathon reiterated the Blue Star holding that, for purposes of this regulation, the approval of a decision by an Assistant Secretary constituted, because of their delegated authority, approval by the Secretary, and the Board lacked any jurisdiction to consider an appeal therefrom. But nothing in either of these decisions or in the language of 43 CFR 4.410 even tangentially touches upon BLM's present argument that determinations as to whether or not a regulation has been duly promulgated in accord with its statutory basis are also removed from the Board's jurisdiction. The suggestion that Blue Star is somehow in conflict with the assertion of such authority ultimately ignores not only the theoretical predicates of the Blue Star opinion but also the fact that the author of the Blue Star decision concurred in the decision in Garland Coal & Mining Co., *supra*, less than 18 months later.

The ultimate question, of course, is whether or not the authority to examine a regulation to determine if it has been duly promulgated exists as part of the decisional authority of the Secretary which has been delegated to the Board. Preliminary to exploring this question, certain general observations are in order as to what is and what is not in controversy.

Thus, it is undisputed that a duly promulgated regulation has the force and effect of law and is binding not only on the public at large but on all of the constituent elements of the Department, including this Board. *See, e.g., McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955). On the other hand, it is equally clear that regulations "in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 973 (1977). *See also Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983); *Women Involved in Farm Economics v. U.S. Department of Agriculture*, 682 F. Supp. 599, 606-07 (D.D.C. 1988). The sole question remaining to be decided with respect to this issue is whether or not the authority to make a determination that a regulation is in conflict with its statutory basis was part of the Secretary's decisional authority when he delegated this authority to the Board.

As the concurring opinion in Krier noted, the authority to determine, in the context of an adjudication, that a regulation was contrary to a statutory enactment and would, accordingly, not be followed had, indeed, been exercised in the past, as the decision in Continental Oil Co., 70 I.D. 473 (1963), attested. In the Continental case, Secretary Udall approved a decision of the Director, BLM, determining that, to the extent the regulation then in issue, 43 CFR 192.123 (1963), purported to provide that the

partial elimination of an oil and gas lease from a unit abrogated the possibility of an extension of that part by constructive production occurring within the unit, it was "inconsistent with, and without the provisions of, the law" and, therefore, the regulation "was invalid and will not be followed." Id. at 475.

In its response, BLM points out that the Secretary is invested with general rulemaking authority and the Board is not. While it is unquestioned that the Secretary, unlike the Board, has general rulemaking authority, the argument advanced by BLM ignores the fact that in the decision in Continental, the Secretary did not purport to exercise his rulemaking authority. ^{4/} Indeed, what the BLM theory essentially overlooks is that the decision in Continental was actually issued by the Director, BLM, and was merely approved by the Secretary. While the Secretary's approval obviated any right of further review in the Department, ^{5/} the fact remains that it was the BLM Director who actually authored the decision declaring the regulation "inconsistent with, and without the provisions of, the law." Id. BLM's argument is premised on a misreading of what occurred in the Continental decision. Unless BLM is now propounding a theory that the Secretary lacks authority to determine, in the context of an adjudication, that a regulation is contrary to the statute and, therefore, not duly promulgated, its argument cannot stand. ^{6/}

BLM recognizes and does not dispute the oft-repeated observation that, in matters properly before it, the Board's jurisdiction is "co-extensive with that of the Secretary" (Response at 13 n.12). While it is obvious that BLM now questions whether the determination of whether a regulation is duly promulgated is part of the adjudicatory process, BLM's position is, itself, internally inconsistent. Thus, BLM argues that the Board does possess the authority to disregard a regulation if a court determines that a regulation is contrary to the law. But BLM fails to explain how, assuming the correctness of its theory that the Board lacks jurisdiction to consider whether a regulation has been duly promulgated, the issuance of a court decision in one case vests jurisdiction in the Board to decide, in another case, not to enforce the regulation.

^{4/} Thus, for example, the decision in Continental was not published in the Federal Register. While a formal regulatory amendment was prepared and ultimately published (see 28 FR 5084 (May 22, 1963)), this occurred independently from the Secretary's approval of the decision of the Director, BLM.

^{5/} At the time that the Continental decision issued, appeals from decisions of the authorized officer were first taken to the Director, BLM (see 43 CFR 221.1 (1963)), and, from there, to the Secretary (see 43 CFR 221.31 (1963)). There was no appeal to the Secretary, however, where a decision had been approved by the Secretary "prior to promulgation." Id. This is what occurred in Continental.

^{6/} Admittedly, it is not clear whether or not BLM would concede that the Secretary does possess such authority.

The Board has held on numerous occasions that it is not required to follow an isolated Federal court decision in other cases where "the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion." Conoco, Inc., 110 IBLA 28, 32 (1990), quoting Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984); see also Triple R Coal Co. v. OSM, 126 IBLA 310, 316 n.4 (1993), and cases cited. In effect, while denying that the Board has any authority to make an initial determination as to whether or not a regulation has been duly promulgated, BLM posits a system wherein issuance of a court determination that a regulation is contrary to the statute vests in the Board the discretionary authority to enter a similar ruling in other cases. BLM fails to offer any theoretical support which might justify such an anomalous jurisdictional construct.

We conclude, therefore, that, consistent with the entire history of Departmental adjudications set forth above, the Board is vested with the authority to determine in the context of deciding an appeal whether or not a regulation as applied to an appellant is duly promulgated, i.e., that it is consistent with its statutory basis, and to direct that any regulation which is clearly contrary to the statute upon which it is premised not be followed in a specific case.

Notwithstanding the foregoing, however, BLM is correct in its assertion that, so long as the Department's regulations are adopted pursuant to lawful authority, this Board is required to enforce them according to their plain language. Indeed, the area of Board consideration is quite limited. In adopting rulemaking, choices are invariably made between many conflicting approaches to the effectuation of statutory goals. Regulations frequently and necessarily fill in the broad legislative outline adopted in a statute. It is demonstrably not the province of this Board to review or question the policy choices implicit in regulations duly adopted by the Department. Rather, the Board's proper area of concern is solely limited to those cases in which the assertion is not that a regulation is unwise or ill-considered, but, rather, that a regulation affirmatively conflicts with the statutory basis under which it was purportedly promulgated. It is with this limitation firmly in mind that we turn to consideration of the substance of the instant appeal.

[2] We indicated in our order of March 1, 1995, that we were concerned with the language of 43 CFR 3833.4(a)(2), which provided that failure to file 7/ the maintenance fee waiver documents for claimants seeking

7/ We note that, in the context of the maintenance fee submissions, "file" includes submissions which are clearly postmarked within the period prescribed for filing and which are received no later than 15 calendar days subsequent to such period. 43 CFR 3833.0-5(m).

a waiver of the fee for the 1995 assessment year on or before August 31, 1994, would be deemed conclusively to constitute a forfeiture of the claims involved. Specifically, we adverted to the fact that the statutory language involved, section 10101(d)(1) of Title X of the Omnibus Budget Reconciliation Act of 1993, Act of August 10, 1993, 107 Stat. 405-06, 30 U.S.C.A. § 281f(d)(1) (West 1995), § was not only silent as to any deadline but expressly required that an individual seeking a waiver of the maintenance fee certify that "on the date payment was due" that the claimant held 10 or fewer claims and had performed required assessment work. We opined that use of the past tense in the statute would "seem to clearly countenance (if not affirmatively compel) the submission of the certification after the date of the relevant maintenance fee deadline," i.e., August 31, 1994, for the year in question (Order of Mar. 1, 1995, at 2), and we questioned whether, assuming a claimant otherwise qualified for a waiver under the Act, the Department's regulations could properly provide for a conclusive determination that a claim was forfeited for failure to file the maintenance fee waiver certification on or before the date that submission of the annual maintenance fee was, itself, required.

As noted above, BLM argues in its response that, in fact, the regulations are entirely consistent with the statutory framework. Our own substantive analysis both of the statutory language and the legislative history of the Maintenance Fee Act now convinces us that, on this point, BLM is correct and that our expressed concerns were based on an initial failure to sufficiently apprehend the essential difference between the Maintenance Fee Act and the Rental Fee legislation which it replaced.

In this regard, a comparison of the differing statutory schemes is appropriate.

The Rental Fee legislation, which was adopted as part of the Fiscal Year 1993 Interior Appropriations Act, had required, for both fiscal years 1993 and 1994, that, in lieu of the performance of assessment work otherwise required, each claimant pay a rental fee of \$100 per mining claim, mill or tunnel site on or before August 31, 1993, for each fiscal year, failing in which the mining claim, mill or tunnel site would be conclusively deemed abandoned. See Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1378-79 (1992). This Act, however, provided a statutory exception to the rental fee requirements for mining claimants who owned 10 or fewer claims and met certain other qualifications, including the performance of annual assessment work. The Act further provided, however, that, in order to

§/ This provision of the Omnibus Budget Reconciliation Act of 1993 was entitled the "Hardrock Mining Claim Maintenance Fee" Act. We will refer to it generally in the text as the Maintenance Fee Act to distinguish it from the annual rental fee requirement adopted in the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), and which covered only Fiscal Years 1993 and 1994. This earlier provision will be referred to as the Rental Fee legislation.

avail themselves of this exception, mining claimants must perform the annual assessment work and "certify the performance of such assessment work to the Secretary by August 31, 1993." *Id.* Thus, the regulatory certification deadline and the associated penalty of conclusively deeming the claims abandoned if the certification deadline were not met (see 43 CFR 3833.1-7(b)-(d), and 3833.4(a)(2) (1993)) were simply replications of the statutory framework.

We had focussed in our order of March 1, 1995, on the fact that, unlike the Rental Fee legislation, the Maintenance Fee Act had not expressly mandated a filing deadline for small miners seeking to except themselves from the \$100 per claim fee. In doing so, however, we failed to give sufficient consideration to another distinction between the Rental Fee legislation and the Maintenance Fee Act. Under the Rental Fee provisions, the right of qualified small miners to be excepted from the fee requirement was a statutory grant based within the Act itself. In adopting the Maintenance Fee Act, however, Congress did not provide for a statutory exception. On the contrary, the language of section 10101(d)(1) provides that "[t]he claim maintenance fee required under this section may be waived for a claimant who certifies in writing to the Secretary that on the date the payment was due" certain statutory requirements for a waiver were met. 30 U.S.C.A. § 28f(d)(1) (West 1995) (emphasis supplied). Not only does the language of the statute indicate that the right to an exemption from the maintenance fee requirements is discretionary with the Secretary, the legislative history of this provision makes it perfectly clear that this is what Congress intended.

Under its own terms, the rental fee requirements adopted in the Fiscal Year 1993 Appropriations Act covered only fiscal years 1993 and 1994. In the course of revisiting this issue in the context of the Omnibus Budget Reconciliation Act of 1993, a difference in approach developed between the Senate and the House of Representatives. The original House version of the Maintenance Fee Act appeared as section 9003 of H.R. 2264, 103d Cong., 1st Sess. While this version required the annual payment of a \$100 maintenance fee for each mining claim, mill or tunnel site, it also provided that holders of fewer than 50 claims could be able to obtain a reduction or waiver of the fees. Whether and to what extent claimants would be able to obtain a reduction or waiver of the fees was left to the discretion of the Secretary of the Interior, though the Secretary's authority to waive, as opposed to reducing, maintenance fees was limited to 10 claims per claimant. 9/

9/ Section 9003(j)(3) of H.R. Rep. No. 2264 provided:

"(3) Waiver or Reduced Maintenance Fees.—

"(A) 10 or Fewer Claims.—The Secretary of the Interior may waive the claim maintenance fee imposed under this section in its entirety for 10 or fewer claims held by a claimant eligible under paragraph (1).

"(B) 11 or More Claims.—

"(i) In General.—Subject to clause (ii), for a claimant eligible under paragraph (1), the Secretary may reduce the claim maintenance fee imposed under this section to \$25 per claim for each claim in excess of 10.

In contrast to the House bill, which provided the Secretary with discretionary authority (within certain defined strictures) to determine both whether a fee reduction or waiver should be authorized and the extent to which either a reduction or waiver of the maintenance fee would be allowed, the Senate bill took a decidedly different tack. The original Senate version of the Hardrock Mining Claim Maintenance Fee Act appeared as Subtitle B of Title V of S. 1134, 103d Cong., 1st Sess. The Senate's approach contained nothing comparable to the House provisions allowing reduction or waiver of fees for claimants owning fewer than 50 claims. Rather, the Senate language generally replicated the rental fee approach, which had statutorily excepted from the required fees those claimants who had certified that they owned 10 or fewer claims and had performed the assessment work otherwise required by law. ^{10/}

In fabricating the final legislative language which was adopted as the Maintenance Fee Act, it became necessary to compromise between the broader, discretionary approach evidenced in the House bill and the narrower, mandatory scheme reflected in the Senate bill. As we noted above, the language ultimately adopted resulted in a narrow, discretionary bill which granted the Secretary the authority to waive (but not reduce) the maintenance fees for those claimants owning 10 or fewer claims. H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. (1993), which accompanied the final version of the Omnibus Budget Reconciliation Act of 1993, discussed both the varying approaches of the two bodies and the ultimate resolution agreed upon:

HARDROCK MINING CLAIMS MAINTENANCE FEE

House bill

The House provision would permanently extend the \$100 per claim maintenance fee in lieu of annual assessment work. In addition, the House bill would allow the Secretary of the

fn. 9 (continued)

"(ii) Limitation.—The reduction provided for in this subparagraph shall be available for no more than 50 claims held by a claimant who is eligible under paragraph (1)."

^{10/} Section 5101(b)(1) of S. Rep. No. 1134 provided:

"The claim maintenance fee required under this section shall be waived for a claimant who certifies in writing to the Secretary that on the date the payment was due, the claimant and all related parties—

"(A) held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands, and

"(B) have performed assessment work required under the Mining Law of 1872 (30 U.S.C. 28-28e) to maintain the mining claims held by the claimant and such related parties for the assessment year ending on noon of September 1 of the calendar year in which payment of the claim maintenance fee was due."

Interior to waive or reduce the fee for claimants holding 50 or fewer claims. Finally, the House bill would impose a \$25 location fee for

Senate amendment

The Senate amendment would extend the \$100 fee for fiscal years 1994-1998 and require the Secretary to waive the maintenance fee for claimants holding 10 or fewer claims. The Senate amendment would also impose the \$25 location fee.

Conference agreement

The Conferees agreed to extend the \$100 claim maintenance fee for fiscal years 1994-1998 and provided the Secretary with discretionary authority to waive the fee for claimants holding 10 or fewer claims. The Conference agreement also imposes the \$25 location fee for new claims. The Conference notes that the discretionary fee waiver for 10 claims in the House language and the mandatory fee waiver for 10 claims in the Senate language were scored as receiving the same level of savings.

H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 504-05, reprinted in 1993 U.S. Code Cong. & Admin. News 1193-94.

It is absolutely clear from the foregoing that Congress knowingly chose to grant the Secretary of the Interior the discretionary authority to provide for the waiver of required maintenance fees for those holding 10 or fewer claims if he deemed such a waiver desirable. In doing so, Congress necessarily vested in the Secretary broad authority to fashion rules implementing such a waiver system. The Secretary's discretionary authority to develop such rules is not constrained by any former procedures used to implement the Rental Fee legislation but rather is only constrained by such express limitations as are inherent in the legislative grant of authority. ^{11/} Since Congress left it to the Secretary to determine if any waiver of the maintenance fee for small miners was to be allowed, the Secretary clearly has the authority to require, as a precondition for granting a waiver, that certification of qualifications for a waiver be filed as of a date certain, failing in which no waiver will be granted. This is essentially what 43 CFR 3833.1-7(d) provides. As this regulation has been promulgated pursuant to lawful authority, ^{12/} this Board is required to enforce it according to its plain terms.

^{11/} Thus, for example, the Secretary could not, consistent with the statutory framework, waive the maintenance fees for claimants holding more than 10 mining claims, mill or tunnel sites.

^{12/} We recognize, of course, that the regulation at issue was published as a final regulation on Aug. 30, 1994, the day before the initial waiver certification was required to be submitted. While this time frame, unfortunately, may not have provided sufficient time to afford all claimants fair

In the instant case, it is undisputed that appellant failed to submit either the required maintenance fees or the waiver certification on or before August 31, 1994, as required by the applicable regulations. Moreover, since appellant paid the rental fees for fiscal years 1993 and 1994, rather than submit an exemption certification under the Rental Fee legislation, it is clear that the provisions of 43 CFR 3833.1-7(a) are not applicable. ^{13/} Thus, the decision of the State Office finding the Midas No. 10 mining claim to be forfeited is clearly in accord with the provisions of the law and the regulations adopted pursuant thereto and must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

fn. 12 (continued)

warning of the certification requirements, we do note that, under 43 CFR 3833.1-7(a), claimants who had timely filed for a rental fee exemption prior to Aug. 31, 1993, were not required to make an initial refiling under the Maintenance Fee Act if the claim ownership situation had not changed in the interim. In any event, while regrettable, the late publication of the regulation violates no provision of APA since the 30-day substantive publication rule, 5 U.S.C. § 553(d) (1994), expressly excepts "a substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. § 553(d)(1) (1994).

^{13/} See note 12, supra.

